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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO SANTELLANES, Defendant and Appellant.	B212037 (Los Angeles County Super. Ct. No. MA040847)

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Murphy, Commissioner. Affirmed.

Angela Berry-Jacoby for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Santellanes appeals from the judgment entered upon his convictions by jury of three counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a)).[1] The trial court sentenced him to an aggregate prison term of 10 years. Appellant contends that (1) the trial court abused its discretion by allowing admission of evidence of three separate prior incidents of sexual misconduct, (2) he was denied due process by the admission of evidence of those prior incidents, (3) he was denied effective assistance of counsel by reason of defense counsel's failure to challenge admission of the Evidence Code section 1108 evidence, and (4) he was denied effective assistance of counsel in violation of his due process rights to counsel and a fair trial when his attorney systematically failed to object to inadmissible and inflammatory hearsay involving prior sexual misconduct.[2]

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The charged incidents

S.G., her brothers, and her mother, Leticia, lived with appellant and his children for two and one-half years while Leticia was dating him. In May 2007, Leticia's family moved out of appellant's residence when Leticia's relationship with appellant ended. S.G. was eight years old at the time.

In the two months before the separation, when Leticia was at work, appellant would ask S.G. to come into his bedroom to play a game. He would have her sit on his stomach facing him, as he lay on his back in the bed, and tell her to "sing [] ABC's or something else." He would then reach into her pants and touch her between her legs. S.G. said that appellant touched her "privates" three or more times, touched the "hole []

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 On July 6, 2009, appellant filed a petition for writ of habeas corpus, case No. B217245, which we consider concurrently with this appeal. A separate order will be filed in that matter.

where you go pee," and inserted his finger into that hole twice. Appellant never hurt or threatened her or told her not to tell anyone. S.G. did not immediately tell Leticia because she was afraid of appellant.

In December 2007, L., appellant's second oldest child, contacted Leticia and cautioned, "[T]ake care of [your] daughter, take real good care of [your] daughter." L. said that, "He's going to do more things, so watch out and take care of your daughter." L. said that when she lived with appellant, he "didn't look at her like a daughter, but like a woman," and he had touched her breast.

After this conversation, Leticia asked S.G. if appellant had ever touched her in a way that she did not like. S.G. began crying and said that he had touched her private parts many times. The police were notified.

Prior incidents of sexual misconduct

L.

Ten years before the charged incidents, appellant resided with his then wife, N.P., and their five children, including their daughters, N. and L.[3] In 1995, L. was 14 years old when she awoke in her bed one night to find appellant lying next to her with his arm draped over her, his hand resting on her breast. She denied that he fondled her breast.

L. also remembered waking up several times when she was 14 years old to find herself topless. She did not think that she had removed her top, but had no memory of appellant being there. She admitted that that occurred even when she slept alone with her door locked.

After L.'s parents divorced, appellant apologized to L. for the "misunderstanding." He did not say that it was for the breast-touching incident.

Three or four months after the breast-touching incident, L. told N.P. about the incident. L. admitted she told her mother right after appellant disciplined her by taking away her telephone privileges. L. did not tell N.P. earlier, not wanting to hurt appellant or cause her parents to fight. N.P. did not report the incident because she feared

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3 We refer to N.P. as "N.P." and to her daughter as "N."

appellant, did not trust L., and the incident did not appear to bother L. When N.P. confronted appellant about it, he denied that it occurred.

N.P. had often seen appellant leaving L.'s room late at night, beginning when L. was three years old. When she asked what he was doing, he would tell her he was checking on her or covering her. On one occasion, she saw appellant lifting the covers on L.'s bed. He claimed that he was covering her. N.P. denied that appellant ever slept with L. when she was 14 years old.

Before trial, Detective Timothy O'Quinn had interviewed L. She told him about the breast-touching incident. She said that she was awakened with appellant lying beside her, his arm draped over her, rubbing her breast over her clothing, not merely resting his hand on her breast, and she moved quickly and rolled over. She also told the detective about a second incident, approximately three months later. She awoke during the night to find appellant in her bedroom lifting the edge of her covers. When she asked him what he was doing, he said "it's hot in here" and quickly left. At trial, she denied that this incident occurred.

N.

N. was appellant's oldest child. When she was 15 years old, she was showering in the only bathroom in the house, when appellant reached into the shower for a bar of soap. She testified that her father never touched her inappropriately, and, if he had, she would have reported it.

N. told N.P. about the incident when it occurred "just to let her know that that had happened." N. also told L., after L. told her about what happened with appellant in her bedroom, because N. did not want L. to think that appellant's conduct with L. was intentional.

Before trial, Detective O'Quinn had interviewed N. She said that when she was 15 years old, she was showering, with the shower curtain closed. She turned around and saw appellant "peeking" through the curtain at her. She yelled for him to get away. He appeared nervous and backed away. As he was leaving the bathroom, he said he was

"half asleep." N. said nothing to the detective about appellant reaching into the shower for soap. At trial, N. denied telling the detective that appellant was "peeking" at her.

Appellant's statement

Detective O'Quinn conducted a tape-recorded interview with appellant after his arrest. He asked appellant if he would agree that whatever happened to S.G. would never happen again. Appellant agreed. Appellant told the detective that S.G. "used to be a very playful girl," who would come to his bed and "start playing." He said that on two or three occasions, she would grab his hand and pull it to her groin. Appellant said, "This is wrong." When asked about L., appellant said he never intended to grab her breast. When the detective asked appellant if he thought he had a problem, appellant said he did not know. The detective asked appellant if S.G. and L. were lying, and to each question, appellant answered, "No."

The defense's evidence

Appellant testified in his own defense. He met Leticia in 2005. She and her three children moved into his apartment in December 2005. Sometimes S.G. would come into the master bedroom while he watched television. She would lie down in bed next to him. On two occasions, when he tried to get up, she sat on his hand and told him he was not going anywhere. He pushed her and felt uncomfortable because she was putting her vagina on his hand. Appellant denied touching S.G.'s vagina or inserting his finger.

When appellant learned of the charges against him, he was "shocked." He denied touching any of his daughters in a sexual way. He thought the allegations may have related to S.G. sitting on his hand. Although he said "yes" when Detective O'Quinn asked him about touching S.G.'s vagina, his mind was not on what the detective was saying. He was thinking about the incident where she sat on his hand. Further, his first language was Spanish, suggesting that he might not have fully understood the questions, though he had spoken English for more than 20 years and testified in English at trial without an interpreter.

Appellant gave numerous reasons why Leticia would make false accusations against him. She wanted to marry him so that she could get her green card, but he

refused and asked her to move out of his residence. After she moved, she and appellant continued having sex, and she wanted to get back together. He again refused. Leticia accused appellant of giving her a sexually transmitted disease and causing her to separate from her husband. She threatened that, "[He] will pay."

Appellant denied the breast-touching incident with L. One night when she was 14 years old, he heard the dogs barking and L. having a nightmare. He went to check on her. She cried a bit, and to comfort her, he "leaned next to her." He lay down in bed beside her and fell asleep. He did not reach over and fondle her breasts. At some point, L. woke him and said she had to go to the bathroom. He then left the room.

Appellant testified that L. also had reasons to falsely accuse him. She accused him the day after he had disconnected her phone as punishment for her talking on it late at night. At the time of trial, he had a poor relationship with L. because he had gotten into a fight with her husband, punched him and broken his nose.

Appellant recalled that when N. was 15 years old, they were getting ready for work and school, respectively. He heard the shower running in the only bathroom in the apartment, but was not sure she was in it because his daughters sometimes ran the water until it got warm before getting into the shower. He was just reaching for a bar of soap, not "peeking" at N.

Appellant's youngest daughter, Diana S., testified that she lived with appellant until she was 14 or 15 years old and that nothing sexually inappropriate ever occurred between her and appellant, and he did not look at her other than as a daughter.

DISCUSSION

I. Evidentiary issues

A. Admission of Evidence Code section 1108 evidence

Before opening statements, the parties argued the admissibility of appellant's prior uncharged sexual offenses. The trial court articulated two factors to be considered in determining if such prior misconduct was admissible; remoteness and similarity to the charged offenses. The trial court ruled that the three prior acts of sexual misconduct by

appellant, the shower incident with N. and the breast and bed-cover incidents with L., were admissible under Evidence Code section 1108.[4]

Appellant contends that the trial court abused its discretion in allowing admission of the prior incidents. He argues that they were dissimilar to the charged incident, were remote in time, involved an inordinate amount of trial time to present, and were all disputed and did not result in convictions. This increased the likelihood of confusing the jury and having it punish him for the prior misconduct.

Respondent contends that to the extent appellant's contention is based on an Evidence Code section 352 analysis, it has been forfeited. We disagree. Appellant's contention was based on the inadmissibility of propensity evidence under Evidence Code section 1108, which specifically refers to Evidence Code section 352. Evidence Code section 1108 was discussed by the parties and by the trial court. The fact that Evidence Code section 352 was not specifically mentioned does not preclude our review. (See *People v. Morris* (1991) 53 Cal.3d 152, 188 [a specific objection requires no specific form of words], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Turning to the merits, we cannot conclude that the trial court's ruling was "'arbitrary, capricious or patently absurd.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

The general rule against evidence of criminal propensity, as embodied in Evidence Code section 1101, subdivision (a),[5] is a long-standing one (*People v. Falsetta* (1999) 21

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[4] Evidence Code section 1108, subdivision (a), provides in relevant part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to Section 352."

[5] Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or

Cal.4th 903, 913 (*Falsetta*)), designed to insure that a defendant is convicted for what the defendant has done, not for who the defendant is. In the mid-1990's, the Legislature carved out an exception to this general rule for defendants charged with sex offenses (Evid. Code, § 1108). Other similar misconduct was made admissible because of the critical need for this evidence "'given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.'" (*Falsetta, supra,* at p. 911.)

Both the Legislature and the courts have been mindful of the potency of such evidence and the risk that a jury might be tempted to convict a defendant for his past conduct without proof of his current charges beyond a reasonable doubt. (*Falsetta, supra,* 21 Cal.App.4th at pp. 916, 918.)[6] To guard against this potential violation of an accused's due process rights, the Legislature made admission of evidence of other misconduct permissible only if it "is not inadmissible pursuant to Section 352" (Evid. Code, § 1108, subd. (a)), and the courts have concluded that Evidence Code section 1108 is saved from due process defects because Evidence Code section 352 "affords defendants a realistic safeguard in cases falling under section 1108." (*Falsetta, supra,* at p. 918.)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Review of a trial court decision pursuant to Evidence Code section 352 is subject to abuse of discretion analysis. [Citations.] 'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58

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evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

6 *Falsetta* upheld Evidence Code section 1108 as against a due process challenge. (*Falsetta, supra,* 21 Cal.4th at p. 922.)

Cal.App.4th 298, 352.) "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'[I]n most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

In considering whether the probative value of uncharged crimes is outweighed by the prejudice, we must evaluate the inflammatory nature of that evidence, the probability of confusion, consumption of time, remoteness as well as other unique factors presented. (*People v. Harris* (1998) 60 Cal.App.4th 727, 738–740 (*Harris*).) As stated in *Falsetta*, "trial judges must consider such factors as [the uncharged offense's] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden of the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission. . . . (*Falsetta, supra*, 21 Cal.4th at p. 917.)

"[T]he willingness to commit a sexual offense is not common to most individuals; thus evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness." (*Review of Selected 1995 California Legislation* (1996) 27 Pacific L.J. 761, 768.) We are satisfied that each of the prior incidents here was relevant to the issues presented. While there are differences here between the prior incidents and the charged incidents, absolute similarity is not required. (*People v. Callahan* (2999) 74 Cal.App.4th 356, 367.) We agree with respondent that

"'sex offenders are not "specialists," and [may] commit a variety of offenses which differ in specific character.'" (*Ibid*.)

The three prior incidents here, like the charged incidents, involved sexual gratification, occurred in appellant's family residence, were directed at young girls over whom appellant had a position of authority, and involved a serious breach of trust on vulnerable children dependent upon him. While they occurred when appellant's daughters were several years older than S.G., N.P. testified that she saw appellant entering his daughters' bedroom in the middle of the night, when they were only three and eight years old, suggesting that the conduct may have been ongoing since the time his daughters were the same age or younger than S.G. Moreover, while the relevance of each of the three incidents was not identical, they were collectively relevant in a way not presented by any one of them individually. The three incidents reflected a long-standing pattern of appellant's deviant preoccupation with the female children who resided with him.

It is especially significant that the three prior incidents were not inflammatory when compared with the egregiousness of the charged offenses. Appellant was charged with touching and digitally penetrating eight-year-old S.G.'s vagina. None of the prior incidents reflected the same degree of violation. Two of them, the shower incident and bed-cover incidents, involved no physical contact with his daughters. The third incident, appellant's touching of L.'s breasts, involved a greater degree of similarity to the charged offenses, but it, like the others, was subject to an innocent explanation. Appellant claimed that he never touched L.'s breast. It is of course possible that he fell asleep next to her and, while sleeping, did not realize that his hand had touched her. "Peeking" into a shower in the only bathroom in the residence, while family members are rushing to get ready for school and work, on one isolated occasion, more than 10 years earlier, with an explanation that appellant was seeking to get the soap, is particularly weak evidence that may have actually undermined the prosecution's case, rather than enhance it. Lifting L.'s bed covers was an ambiguous act and subject to appellant's claim that he was just covering her up. The comparatively minor nature of the prior incidents make it unlikely

that the jury felt enraged enough to punish appellant for his past conduct, rather than the more egregious charged conduct.

While the three uncharged offenses occurred approximately 10 years before the charged offense, the time lapse did not render them too remote. No specific time limit has been established for determining when an uncharged offense is too remote. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 900.) Uncharged conduct occurring five years (*People v. Regalado* (2000) 78 Cal.App.4th 1056, 1059) and 23 years (*People v. Pierce*, *supra*, at p. 900) before the charged offenses have been found not to be too remote to preclude the evidence. Here, given that all of the involved sexual misconduct occurred with young children living with appellant, the 10-year time period was not inordinate.

While the evidence of the prior incidents occupied a substantial portion of the trial testimony, given the differences between those incidents and the charged incidents, and the involvement of different victims, it is unlikely to have caused the jury any confusion. Moreover, in closing argument, the prosecutor emphasized the evidence most critical to the People's case was not the prior incidents. He stated, "But here is the most important thing of all: Both [S.G.] and defendant have said that there was touching of her private parts." Appellant admitted touching S.G.'s vagina, but testified that it occurred when she sat on his hand to prevent him from leaving the room. We therefore conclude that on balance, the trial court's ruling was not outside the bounds of reason. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.)

Appellant relies heavily on *Harris* in arguing that his prior sexual offenses should not have been allowed in evidence. In *Harris*, the defendant, a mental health nurse, was accused of kissing and fondling two patients, one with whom he had previously had consensual sex. The trial court permitted the admission of a prior sexual offense occurring 23 years earlier, involving a violent attack on a female resident of his apartment building in which he entered her apartment at night, beat her unconscious, and inflicted extensive injuries to her vagina and rectum with a sharp instrument. *Harris* is inapposite, as the prior acts involved in that case were violent and brutal and found to be "inflammatory *in the extreme*." (*Harris, supra,* 60 Cal.App.4th at p. 738.) Here, the

prior sexual offenses were minor when compared to the charged offenses and not inflammatory.

Even if it was error to admit the prior bad acts evidence, that error was harmless in that there is no reasonable probability that a more favorable decision would have been obtained had the evidence been admitted. (*See People v. Mullens* (2004) 119 Cal.App.4th 648, 659; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1170.) The evidence against appellant was strong. S.G. testified that appellant asked her to come into his room and sit on his stomach facing him on the bed. He then touched and digitally penetrated her vagina. In his interview with Detective O'Quinn, appellant admitted touching S.G.'s vagina, though he gave the unbelievable explanation that it occurred when S.G. grabbed his hand and sat on it to prevent him from leaving the room. But even under appellant's version of events, he admitted that his behavior was wrong. Appellant unconvincingly sought to explain his statement to the detective by claiming that when he answered the detective's questions, he was only thinking of the time S.G. sat on his hand, not that he touched her vagina and inserted his finger. He also claimed that he did not fully understand the questions the detective asked because English was not appellant's first language. But he had been speaking English for 20 years and was able to testify at trial without the aid of an interpreter.

Further, as discussed above, the prior sexual offenses were not so heinous that the jury would likely be inflamed by them and want to punish appellant for his past conduct.

Finally, the jury was instructed in accordance with CALCRIM No. 1190 that appellant could be convicted of a sex act by the testimony of the victim alone and CALCRIM No. 1191 that prior sex offenses alone were insufficient to sustain the conviction. In closing argument, defense counsel emphasized the remoteness of the prior incidents and that there was a lengthy period of many years when there was no suggestion that appellant engaged in sexual misconduct. The jury nonetheless rejected the defense arguments.

B. Admission of prior acts of sexual misconduct as violation of due process

Appellant contends that he was denied a fundamentally fair trial in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution by abusing its discretion under Evidence Code section 352 and admitting the evidence.

Respondent contends that appellant forfeited this contention by failing to raise it in the trial court. We conclude that this claim was not forfeited but that it merely restates the Evidence Code section 352 claim under an alternative legal principle. (*People v. Partida* (2005) 37 Cal.4th 428, 435–436.)

In any event, this claim is without merit. Because we have concluded that the trial court did not abuse its discretion in admitting the evidence of prior sexual offenses, it follows that the admission of that evidence did not violate due process.

II. Ineffective Assistance of Counsel

A. Failure to properly challenge the admission of evidence of prior sexual misconduct

Appellant's counsel objected to the admission of evidence of his alleged prior sexual offenses. He stated that he did not believe they were admissible and that "normally prior bad acts are inadmissible. They are presumed inadmissible, so there has to be an offer of proof as to—they can't just be for the characterizing of the person to commit the criminal act." The prosecutor corrected defense counsel and stated that under Evidence Code section 1108, it is admissible on the issue of appellant's propensity to commit a sexual offense. Neither counsel referred to the Evidence Code section 352 analysis of the violation of due process.

Appellant contends that he was denied effective assistance of counsel due to trial counsel's failure to properly challenge the admission of the Evidence Code section 1108 evidence of prior sexual misconduct. He argues that because defense counsel was unaware of the analysis under Evidence Code section 1108, the trial court did not properly evaluate the proposed testimony under Evidence Code section 352. This contention is without merit.

The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland v. Washington, supra*, at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Because we conclude that the admission of evidence of the prior sexual offenses was not an abuse of discretion, it follows a fortiori that it is not reasonably probable that had defense counsel challenged the admission of that evidence any differently, a verdict more favorable to appellant would have ensued. Further, even if the trial court did not articulate an Evidence Code section 352 analysis, we presume, in the absence of evidence to the contrary, that the trial court considered all relevant criteria (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430). "We affirm the ruling if it is correct on any ground, regardless of the trial court's stated reasons. [Citation.]" (*Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550, 558.)

B. Failure to object to inadmissible and inflammatory hearsay involving the prior bad acts

Appellant contends that he suffered ineffective assistance of counsel in violation of his due process rights to counsel and fair hearing by reason of his attorney's failure to object to "inadmissible and inflammatory" hearsay involving the alleged prior sexual

offenses. He argues that "[t]he nature of much of that evidence was inadmissible hearsay to which defense counsel failed to object." He continues that "[w]ithout objection, Leticia, [] [N.P.], and Detective O'Quinn all testified about inadmissible hearsay statements of others regarding the prior uncharged acts." This contention is without merit.

Because we have concluded that any error in admitting all of the propensity evidence of the three prior sex offenses was harmless, it follows that including those portions of that evidence that may have been inadmissible hearsay was also harmless and its exclusion would not have affected the outcome.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ